

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA/SEATTLE

MAX O.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

Case No. 3:23-cv-5757-TLF

ORDER AFFIRMING
DEFENDANT'S DECISION TO
DENY BENEFITS

Plaintiff filed this action pursuant to 42 U.S.C. § 405(g) for judicial review of defendant's denial of plaintiff's application for Disability Insurance Benefits (DIB). Pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73, and Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge. Dkt. 2. Plaintiff challenges Commissioner's decision finding him not disabled. Dkt. 4, Complaint.

A. Background

Plaintiff filed for SSI on September 29, 2015. AR 358–63. His amended alleged onset date is September 22, 2016. AR 77, 1610. ALJ Marilyn Mauer held a hearing on plaintiff's claim in October 2017 (AR 73–101) and issued a decision finding plaintiff not disabled in February 2018 (AR 171–96) which was subsequently vacated by the Appeals Council (AR 197–201).

ALJ Mauer held another hearing in February 2020 (AR 102–16) and issued an unfavorable decision in March 2020 (AR 10–43). After plaintiff appealed to this Court,

1 United States Magistrate Judge Brian Tsuchida reversed ALJ Mauer's decision in July
2 2021. AR 1747–55. On remand, ALJ Allen Erickson (the ALJ) held a hearing on
3 February 23, 2023. AR 1643–1702. He issued a decision, dated April 26, 2023, finding
4 plaintiff not disabled. AR 1606–42.

5 The ALJ found plaintiff had the following severe impairments: cervical spine
6 degenerative disc disease and degenerative joint disease, psychogenic seizures,
7 PTSD, and bipolar disorder. AR 1612. The ALJ found plaintiff had the Residual
8 Functional Capacity (RFC)

9 to perform medium work as defined in 20 CFR 404.1567(c) and 416.967(c),
10 except that he is able occasionally to climb ladders, ropes, or scaffolds, with
11 occasional exposure to hazards, including occasional commercial driving. He is
12 able to understand, remember, and apply short, simple instructions; performing
routine, predictable tasks; not in fast-paced, production-type environment; to
make simple decisions; to tolerate exposure to occasional, routine workplace
changes; with occasional interaction with the general public.

13 AR 1617. Based on hypotheticals posed to the vocational expert (VE) at the hearing,
14 the ALJ found plaintiff could not perform his past work but could work, instead, as a
15 cleaner II; cleaner, lab equipment; or waxer, floor. AR 1631.

16 B. Discussion

17 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of
18 Social Security benefits if the ALJ's findings are based on legal error or not supported
19 by substantial evidence in the record as a whole. *Revels v. Berryhill*, 874 F.3d 648, 654
20 (9th Cir. 2017) (internal citations omitted). Substantial evidence is “such relevant
21 evidence as a reasonable mind might accept as adequate to support a conclusion.”
22 *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (internal citations omitted). The Court
23 must consider the administrative record as a whole. *Garrison v. Colvin*, 759 F.3d 995,
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1 1009 (9th Cir. 2014). If the evidence would reasonably support affirming the ALJ's
2 decision, or reversing it, the Court may not substitute its own judgment for the ALJ's.
3 *Ferguson v. O'Malley*, 95 F.4th 1194, 1199 (9th Cir. 2024).

4 The Court also must weigh both the evidence that supports and evidence that
5 does not support the ALJ's conclusion. *Id.* The Court may not affirm the decision of the
6 ALJ for a reason upon which the ALJ did not rely. *Id.* Rather, only the reasons identified
7 by the ALJ are considered in the scope of the Court's review. *Id.*

8 **1. Medical Opinion Evidence**

9 a. Keiran Shute, MD

10 Plaintiff challenges the ALJ's assessment of the medical opinion of treating
11 provider Dr. Shute. Dkt. 14 at 3–9. Dr. Shute completed a medical opinion in July 2017
12 in which he opined plaintiff could perform only light work. AR 1034–36. The ALJ gave
13 Dr. Shute's opinion little weight, and instead gave weight to the contrary opinion of
14 examining physician Dr. Leinenbach. AR 1625–26.

15 Under the regulations applicable to this case, to reject the opinion of a treating or
16 examining physician where the opinion is at odds with opinion evidence from other
17 medical professionals (as is the case with Dr. Shute's opinion), the ALJ must provide
18 "specific and legitimate reasons that are supported by substantial evidence." *Revels v.*
19 *Berryhill*, 874 F.3d 648, 654 (9th Cir. 2017) (citation omitted).

20 The ALJ found Dr. Shute's opinion was inconsistent with objective medical
21 evidence throughout the record which indicated plaintiff had normal strength and range
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1 of motion.¹ AR 1626. This is a valid basis on which to reject a controverted treating
2 physician's opinion. See *Smartt v. Kijakazi*, 53 F.4th 489, 495–96 (9th Cir. 2022).

3 The ALJ's finding was supported by substantial evidence. Dr. Shute based the
4 opined limitations on decreased range of motion in the neck and pain in his back (see
5 AR 1034), but as the ALJ pointed out, clinical findings throughout the record found
6 plaintiff had normal range of motion and strength, as well as other normal findings, in
7 both areas (see, e.g., AR 605, 660, 790, 801, 805, 1095, 1560, 2224, 2268, 2287–88),
8 as did many of Dr. Shute's own treatment notes rendered after his July 2017 opinion
9 (see AR 1252, 1257, 1263, 1275, 1283, 1286–87, 1299, 1302, 1305, 1308, 1319, 1382,
10 1508, 1515).

11 Plaintiff counters with several treatment notes from June and July 2017 which
12 purportedly show otherwise (see Dkt. 14 at 9) but the ALJ's finding remains supported
13 by substantial evidence notwithstanding such notes, as the longitudinal evidence from
14 before and after this period, for the most part, displays normal back and neck findings
15 which the ALJ reasonably found inconsistent with Dr. Shute's opinion. See *also* AR
16 1612–13 (pointing out, in finding plaintiff's back impairment non-severe, that most
17 complaints stemmed from a few isolated incidents). If the evidence would reasonably
18 support affirming the ALJ's decision, or reversing it, the Court may not substitute its own
19 judgment for the ALJ's. *Ferguson v. O'Malley*, 95 F.4th 1194, 1199 (9th Cir. 2024).

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21 ¹ Plaintiff points out that "this Court rejected some of the reasons the ALJ used in" its earlier decision. Dkt.
22 at 1; see *also* AR 1752–53. However, the reason discussed here—inconsistency with medical
23 evidence showing normal range of motion and strength—was not one of the reasons relied upon in ALJ
24 Mauer's 2020 decision. Compare AR 1626 with AR 29. And, the evidence cited by ALJ Mauer in her 2020
25 decision was found to be problematic because it involved normal shoulder findings, and, as this Court
said, "there is nothing indicating [such] findings defeat the findings regarding neck and lumbar pain." AR
1752. The rationale discussed above pertains to medical findings related exclusively to plaintiff's neck
and back, and not his shoulder.

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2 Because the ALJ's finding was supported by substantial evidence and was a
3 valid basis on which to reject Dr. Shute's opinion, the Court need not consider the
4 remaining reasons proffered for rejecting the opinion, as any error with respect to those
5 reasons would be harmless. *See Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012).

6 b. Peter Weiss, PhD, and Terilee Wingate, PhD

7 Plaintiff challenges the ALJ's assessment of the medical opinion of Dr. Weiss.
8 Dkt. 14 at 10–16. Previously, this Court affirmed ALJ Mauer's finding that Dr. Weiss's
9 opinion was inconsistent with normal mental status examinations, and found this was a
10 sufficient basis on which to find the opinion unpersuasive. *See* AR 1754–55.

11 Plaintiff argued to this Court that the ALJ erred by cherry-picking normal mental
12 examination findings, but “relie[d] on scant evidence from February–May 2019
13 documenting a flare of symptoms related to a new seizure-related diagnosis.” AR 1754
14 (citing AR 1477–79). This Court reasoned that “this short-lived exacerbation does not
15 demonstrate the ALJ erred in finding that the treatment record generally indicated
16 normal functioning, a finding supported by substantial evidence in the longitudinal
17 record.”

18 After the most recent hearing, the ALJ's relied in the April 2023 decision, in part,
19 on the same rationale—inconsistency with the longitudinal record of normal mental
20 status examinations—in rejecting Dr. Weiss's opinion. *Compare* AR 32 *with* AR 1628.
21 Plaintiff challenges this finding again, relying upon the same evidence in both appeals,
22 documenting a symptomatic flare related to a seizure-related diagnosis to show that the
23 evidence cited by the ALJ “did not show sustained improvements.” *See* Dkt. 14 at 14–
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1 15 (citing AR 1477–79). “[T]he law of the case doctrine . . . appl[ies] in the social
2 security context.” *Stacy v. Colvin*, 825 F.3d 563, 567 (9th Cir. 2016). It “generally
3 prohibits a court from considering an issue that has already been decided by that same
4 court or a higher court in the same case.” *Id.* (citing *Hall v. City of Los Angeles*, 697
5 F.3d 1059, 1067 (9th Cir. 2012)). Because Plaintiff’s challenge to the ALJ’s rationale for
6 rejecting Dr. Weiss’s opinion has already been rejected by this Court, the law of the
7 case doctrine precludes Plaintiff from relitigating the same issue.

8 Plaintiff also challenges the ALJ’s assessment of the medical opinion of
9 examining source Dr. Wingate. Dkt. 14 at 17–20. In July 2017, Dr. Wingate opined
10 marked limitations in Plaintiff’s abilities to maintain appropriate behavior in a work
11 setting and complete a normal workday and workweek without interruptions from
12 psychologically based symptoms. AR 1046.

13 The ALJ found the limitations opined by Dr. Wingate were inconsistent with the
14 longitudinal evidence of record, citing many of the same treatment notes he found
15 inconsistent with Dr. Weiss’s opinion. AR 1627. Plaintiff argues this was erroneous for
16 “the same reasons” he argued the ALJ’s reliance on the same mental status treatment
17 notes were erroneous in the context of Dr. Weiss’s opinion—namely, that they were
18 contradicted by progress notes from the February through May 2019 period. Dkt. 14 at
19 20 (citing AR 1477–79). The Court rejects this argument for the same reason it
20 previously rejected the same argument in the context of Dr. Weiss’s opinion—those
21 progress notes reflected a “short-lived exacerbation” of plaintiff’s condition, and the
22 ALJ’s finding that “the treatment record generally indicated normal functioning” is
23 supported by substantial evidence. AR 1754.

1 Therefore, the Court finds no error in the ALJ's assessment of the medical
2 opinions of Drs. Weiss and Wingate.

3 **2. Subjective Symptom Testimony**

4 Plaintiff challenges the ALJ's assessment of his statements about symptoms and
5 limitations. Plaintiff testified that he had several mental limitations,² some of which
6 resulted from his seizure medication—he had brain fog, anxiety triggered by being
7 around others, difficulty with memory, and had low motivation and energy. AR 86–89,
8 107–08, 1665–70.

9 Where a claimant presents evidence of an underlying impairment or impairments
10 which could be expected to produce the alleged symptoms, “the ALJ can reject
11 [plaintiff's] testimony about the severity of his symptoms only by offering specific, clear,
12 and convincing reasons,” unless there is evidence of malingering. *Garrison*, 759 F.3d at
13 1014–15 (citing *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996)).

14 The ALJ found that plaintiff's allegations were inconsistent with objective medical
15 evidence. AR 1625. He found that plaintiff “had some periods of mood challenges” but
16 “these episodes were not long lasting” and “would not result in greater limitations on his
17 longitudinal functioning than is set forth in the [RFC].” AR 1625. He also noted that

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19 ² Plaintiff also testified to several physical limitations. Plaintiff only raises arguments challenging: (1) the
20 ALJ's assessment of his activities of daily living and (2) the ALJ's finding that his alleged mental
21 limitations were inconsistent with objective evidence. See Dkt. 14 at 21–23. Yet the ALJ also found to
22 additional reasons: (3) Plaintiff's alleged physical limitations were inconsistent with Plaintiff's lack of
23 treatment, and (4) Plaintiff's alleged physical limitations were inconsistent objective medical evidence in
24 the record. See AR 1624–25. Plaintiff is not allowed to raise a challenge to these reasons, because in the
25 opening brief, Plaintiff made no allegation of error with respect to the third and fourth reasons. Dkt. 14 at
21–23. See *Indep. Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003). These reasons are
sufficient to uphold the ALJ's decision. See *Molina*, 674 F.3d at 1115; *Parra v. Astrue*, 481 F.3d 742, 751
(9th Cir. 2007) (“[E]vidence of ‘conservative treatment’ is sufficient to discount a claimant's testimony
regarding severity of an impairment.”).

1 providers consistently found plaintiff to have intact memory, attention, and
2 concentration. AR 1625 (citing AR 1402, 1404, 1406, 1408, 1409, 1431, 2021, 2028,
3 2049, 2056, 2319, 2324, 2329, 2335, 2340, 2345). This is a sufficient basis on which to
4 reject plaintiff's testimony. See *Smartt*, 53 F.4th at 498 ("When objective medical
5 evidence in the record is *inconsistent* with the claimant's subjective testimony, the ALJ
6 may indeed weigh it as undercutting such testimony.") (emphasis in original).


7 Plaintiff contends the ALJ ignored "progress notes" and ignored "cycles of
8 improvement and decline" that plaintiff underwent, but only cites to the same evidence
9 cited to with respect to Drs. Wingate and Weiss's opinions—evidence from plaintiff's
10 mental health exacerbation in February through May 2019 caused by a rise in seizures.
11 Dkt. 14 at 22–23. But as discussed, this evidence demonstrates plaintiff had a
12 temporary period of exacerbated mental health limitations, yet it does not contradict the
13 ALJ's finding that the longitudinal evidence showed plaintiff's mental impairments were
14 not significantly limiting in the manner he alleged. Because the ALJ did not err in finding
15 plaintiff's allegations inconsistent with the medical evidence, the Court need not
16 consider the remaining reasons he gave in discounting plaintiff's subjective symptom
17 testimony. See *Molina*, 674 F.3d at 1115.

18 In sum, the ALJ gave specific, clear, and convincing reasons for discounting
19 plaintiff's subjective symptom testimony.
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1 C. Conclusion

2 Based on the foregoing discussion, the Court concludes the ALJ properly
3 determined plaintiff to be not disabled. Therefore, the ALJ's decision is affirmed.
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5 Dated this 2nd day of July, 2024

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Theresa L. Fricke
8 United States Magistrate Judge
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